Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA
BUSINESS COMMITTEE, ET AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE

BERNARD J. ROTHBAUM, JR.

Counsel for the Absentee Delaware Tribal Business Committee, et al.

of Counsel:

TOMERLIN, HIGH, PATTON & ROTHBAUM
323 Fidelity Plaza
Oklahoma City, Oklahoma 73102

August, 1976

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Introduction	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	6
Statement	9
Summary of Argument	16
Argument	25
I. Appellees' suit presents a nonjusticiable political question	25
II. The Absentee Delaware Tribe of Western Oklahoma, and its governing body, being immune from suit, this case should have been dismissed by the District Court	34
III. The District Court held this Indian claims judgment distribution statute to an improper standard of review	46
IV. Congress could rationally decide to limit distribution of a Claims Commission judgment to statutorily described members of the two federally recognized Delaware Tribes	50
V. The District Court correctly concluded that the "Kansas Delawares" have no vested interest compensable under the Just Compensation Clause of the Fifth Amendment to the funds distributed by 25 U.S.C. (Supp. IV) 1291-1297;	

TABLE OF CONTENTS CONTINUED PAGE

in any event, an independent judgment could only be entered by the Court of Claims in a direct proceeding against the United States 62

Conclusion 65

TABLE OF AUTHORITIES

CASES:

Aetna Life Insurance Company v. Haworth, 300 U.S. 227 ..... 20, 36

Baker v. Carr, 369 U.S. 186 ..... 3, 26, 32, 33
Bell v. Hood, 327 U.S. 678 30
Board of County Commissioners v. Seber, 318 U.S. 705 ..... 23, 57

Cherokee Nation v. Georgia (US) 5 Pet. 1, 20 33
Cherokee Nation v. Hitchcock, 187 U.S. 294 ..... 17, 28, 29
Church, et al v. Morton, et al, Civ. No. KC 3696 (D. Kan.) 40

Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma v. United States, 130 Ct.Cl. 782, 128 F.Supp. 391 (1955) 13
Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma v. United States, 192 Ct.Cl. 906, 427 F.2d 1218 (1970) 39
Delaware Tribe of Indians, In re, Docket No. 152 (J.P.M.L.) 40

Eisen v. Carlisle and Jaquelin, 417 U.S. 156 ..... 20, 42
Elk v. Wilkins, 112 U.S. 94 ..... 5, 13, 14, 16, 59

Fisher v. District Court, ... U.S. ....., No. 75-5366 (March 1, 1976) 23, 56
Ford Motor Company v. Department of the Treasury, 323 U.S. 459 44

Goldberg v. Kelly, 387 U.S. 254 54

AUTHORITIES CONTINUED PAGE

Halbert v. United States, 283 U.S. 753 ..... 24, 59, 61
Hicks v. Miranda, 422 U.S. 332 31
Holden v. Joy, (U.S.) 17 Wall. 212 55
Hurley v. Kincaid, 285 U.S. 95 ..... 25, 64

Jefferson v. Hackney, 406 U.S. 535 51

Katzenbach v. Morgan, 384 U.S. 641 51

Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir., 1975), cert. den. sub nom. Susenkewa v. Hathaway, ... U.S. ... (March 29, 1976) 20, 43
Lone Wolf v. Hitchcock, 187 U.S. 553 ... 3, 17, 19, 20, 25, 28

McCray v. United States, 195 U.S. 27 49
Means v. Wilson, 522 F.2d 833 (8th Cir., 1975) 20, 43
Menominee Tribe v. United States, 391 U.S. 404, affirming, 179 Ct.Cl. 496, 388 F.2d 998 ..... 42, 53
Mine Safety Appliances Company v. Forrestal, 326 U.S. 371 ..... 20, 43
Minnesota Chippewa Tribe v. United States, 161 Ct.Cl. 258, 315 F.2d 906 (1971) 4, 18, 19, 24, 54, 58
Minnesota v. Hitchcock, 185 U.S. 373 44
Missouri v. Holland, 252 U.S. 416 55
Moe v. Confederated Salish and Kootenai Tribes, ... U.S. ..., No. 74-1656 (April 27, 1976) 23, 52 53, 54, 56
Morton v. Mancari, 417 U.S. 535 2, 3, 22, 52, 54, 56, 58, 59
Morton v. Ruiz, 415 U.S. 199 ..... 23, 56

Northwestern Shoshone Tribe v. United States, 324 U.S. 335 ..... 16, 28
Northern Cheyenne Tribe v. Hollowbreast, ... U.S. ..., No. 75-145 (May 19, 1976) 2, 7, 51, 52, 55 56, 60, 63, 64
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 30

Regional Rail Reorganization Act Cases, 419 U.S 102 ..... 25, 64

AUTHORITIES CONTINUED PAGE

San Antonio School District v. Rodriguez, 411 U.S. 1 54
Stanley v. Illinois, 405 U.S. 645 54
Stephens v. Cherokee Nation, 174 U.S. 445 19, 20, 53
Shapiro v. Thompson, 394 U.S. 618 54
Simmons v. Eagle Seelatsee, 384 U.S. 209, affirming 224 F.Supp. 808 (E.D. Wash. 1965) 3, 22, 24, 38 51, 52, 58, 59
Sizemore v. Brady, 235 U.S. 441 19, 22, 28, 29 38, 52, 56
Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974) 20, 43
Tiger v. Western Investment Company, 221 U.S. 286 32
Turner v. United States, 248 U.S. 354 20, 35
Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct.Cl. 426, 490 F.2d 935 19, 54, 58
United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 55
United States v. Jim, 409 U.S. 80 29, 51, 52, 56, 62, 63
United States v. Native Village of Unalakleet, 188 Ct.Cl. 1, 411 F.2d 1255 (1969) 31
United States v. O'Brien, 391 U.S. 367 48, 49
United States v. Sandoval, 231 U.S. 28 30, 31
United States v. United States Fidelity and Guaranty Company, 309 U.S. 506 3, 20, 21, 34, 35 36, 38, 41, 42
Wallace v. Adams, 204 U.S. 415 53
Weber v. Freed, 239 U.S. 325 49
Weinberger v. Salfi, 422 U.S. 749 4, 24
Wilbur v. United States, ex rel Kadrie, 281 U.S. 206 61

INDIAN CLAIMS COMMISSION DECISIONS:

Delaware Tribe of Oklahoma and Absentee Delaware Tribe of Oklahoma v. United States,
2 Ind. Cl. Comm. 253 (1953) 39
3 Ind. Cl. Comm. 622 (1955) 39
3 Ind. Cl. Comm. 346 (1956) 39
8 Ind. Cl. Comm. 150 (1959) 39

AUTHORITIES CONTINUED — PAGE

21 Ind. Cl. Comm. 344 (1960) 14
21 Ind. Cl. Comm. 18 (1969) 39
24 Ind. Cl. Comm. 179 (1970) 39
24 Ind. Cl. Comm. 468 (1971) 39

UNITED STATES CONSTITUTION:

Fifth Amendment 2, 5, 6

STATUTES AT LARGE:

86 Stat. 762 ..... 2, 5, 6-8, 16, 26

Act of March 3, 1971, 16 Stat. 544 26

Indian Claims Commission Act, 60 Stat. 1049 31

UNITED STATES CODE:

25 U.S.C. 1181-1186 50
25 U.S.C. (Supp. IV) 1291-1297 ..... 2, 5, 6, 8, 14, 30, 39, 64
25 U.S.C. (Supp. IV) 1292(c) 15
25 U.S.C. (Supp. IV) 1292(c)(2) 57
25 U.S.C. (Supp. IV) 1294 ..... 17, 24, 58
25 U.S.C. (Supp. IV) 1294(a) 58

28 U.S.C. (Supp. IV) 1292 2
28 U.S.C. 1331(a) 2
28 U.S.C. 2201 36
28 U.S.C. 2282 2

50 U.S.C. App. 462(b) 48

TREATIES:

Treaty of St. Mary's, 7 Stat. 188 9
Treaty of 1854, 10 Stat. 1048 ..... 10, 11, 12, 17, 55
Treaty of 1860, 12 Stat. 1129 12
Treaty of 1866, 14 Stat. 793 ..... 13, 17, 21, 60-61

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 23(b)(1)(B) 3, 35
Rule 23(b)(2) 3, 35

AUTHORITIES CONTINUED PAGE

TREATISES:

E. Corwin, (Ed.) Constitution of the United States of America, Annotated (1953) P. 432 26

F. Cohen, Federal Indian Law (Rev. Ed., 1958) 22, 23 52, 53, 57, 61

MISCELLANEOUS:

S. Rep. No. 1518, 90th Cong. 2d Sess. 10, 11

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA
BUSINESS COMMITTEE, ET AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE

INTRODUCTION

This Brief is submitted in response to the Order of the Court dated June 14, 1976.

OPINION BELOW

The opinion of the District Court is reported as *Weeks v. United States*, 406 F.Supp. 1309 (W.D. Okla., 1975). A copy of the opinion, dissenting opinion, judgment and pertinent orders of the court are attached to the Jurisdictional Statement as Appendix A and may be found at pages 1a-135a of the Jurisdictional Statement of these appellants.

JURISDICTION

Appellees, the "Kansas Delawares", invoked the jurisdiction of the District Court pursuant to 28 U.S.C. 1331(a). Appellees' complaint alleged that 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 was discriminatory and violative of the Due Process Clause of the Fifth Amendment and sought an injunction restraining the operation of the statute as well as other relief. Pursuant to 28 U.S.C. 2282 a three-judge District Court was convened.

On December 18, 1975 the District Court, Judge Daugherty dissenting, entered its judgment enjoining the operation of the statute, holding it arbitrary and violative of the Fifth Amendment. A timely Notice of Appeal was filed on January 16, 1976, J.S. App. pp. 115-117. The appeal was timely docketed on March 15, 1976. Probable jurisdiction was noted on June 14, 1976. The time for filing the Brief on the Merits was, on July 7, 1976, extended to and including August 18, 1976.

The jurisdiction of this Court to review the judgment below on direct appeal is conferred by 28 U.S.C. 1292. E.g., *Morton* v. *Mancari*, 417 U.S. 535.

QUESTIONS PRESENTED

The District Court held 86 Stat. 762, 25 U.S.C. 1291-1297, a statutory scheme distributing some nine million dollars to satisfy an award of the Indian Claims Commission, unconstitutional for failure to conform to the "equal protection component" of the Due Process clause of the Fifth Amendment. The questions presented by this holding of first impression are:

1. Whether, in the circumstances of this case, the holding of *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565-568, has, as the District Court implied, been overruled, *sub silento,* by *Baker* v. *Carr,* 369 U.S. 186, 210-211, 215?

2. Whether the decision of the District Court is inconsistent with *Morton* v. *Mancari,* 417 U.S. 535, 552-553 and n. 24, regarding permissible distinctions between individuals who are, or may be, members of federally recognized Indian Tribes and other individuals, who could be racially classified as "Indians," but who do not meet the statutory or tribal criteria for membership in a federally recognized tribe?

3. Whether the District Court erred in limiting to its particular facts this Court's affirmance of *Simmons* v. *Eagle Seelatsee,* 384 U.S. 209, *affirming* 224 F.Supp. 808 (E.D. Wash. 1965), and refusing to apply the principle of *Simmons* in the preesnt case?

4. Whether Federal Rules of Civil Procedure 23(b)(1)(B) and 23(b)(2) were improperly employed by the District Court to avoid dismissing this action, and, if so, whether the admitted immunity of the tribal business committee from suit and its status as an indispensable party was disregarded through a use of class action procedure which contravenes this Court's holding in *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506, 512-513?

5. Whether the District Court erred in holding that Congress was forbidden by the Constitution from relying upon the holding of the Court of Claims that "the Indian Claims Commission Act requires that awards be made, not

to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today?" *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971).[1]

6. Whether an Act of Congress, distributing judgment funds and involving a noncontractual, nonvested claim on the public Treasury, must meet the rigorous standards of judicial review applicable to statutes involving criminal procedure, parental custody proceedings, marital and family relations, and other basic liberties of the individual, or whether the more flexible standard of review employed in areas of economic and social benefit legislation is applicable to such an Act of Congress?

7. Whether the holding of the District Court, which, as applied, requires that statutes distributing judgment funds be drafted so as to permit an individualized hearing of, and determination upon, the claim of every person who alleges ancestry in an Indian tribe from the "time of the wrong" is inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 776-785?

8. (a) Whether the District Court erred in adopting as a standard for constitutional review of Indian claims judgment statutes a theory of "but for" causation, inseparably linking the judgment statutes to the theoretical circumstances which could have, but did not, exist, at the "time of the wrong" without regard for any intervening circumstances or events, *e.g.*, by holding that if a sum cer-

---

[1] No question is raised as to the power of Congress to disregard this construction of the Act if Congress chooses; the question is whether the Constitution forbids Congress from adopting this construction of the Act if, after consideration, Congress elects to do so.

tain had been paid to the Delaware Tribe in 1854, the Constitution requires a conclusive presumption that this same sum would have been a part of the tribe's assets decades later?

(b) Particularly, whether the District Court erred in holding that the Treaty of July 4, 1866, 14 Stat. 793, 796, by which the ancestors of the present "Kansas Delaware" claimants renounced their Delaware citizenship and right to participate in tribal councils, and assumed United States citizenship and other benefits unavailable, at that time, to tribal Indians, see, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106, was irrelevant because the Due Process Clause commands Congress to conclusively presume "but for" causation in judgment statutes?

9. Whether, regardless of the standard of review employed, the terms of 86 Stat. 762, 763, 25 U.S.C. 1291-1297 are so arbitrary and capricious as to be violative of the Due Process Clause of the Fifth Amendment?

10. Whether the District Court erred in disregarding the congressional policy of distributing Indian claims judgment awards on a basis other than ethnological "tracing" of "blood descendants" from the "time of the wrong" for which the award is made, in the absence of an unequivocal showing that this congressional policy is repugnant to the Due Process Clause of the Fifth Amendment?

11. Whether the District Court properly enjoined the operation of an Act of Congress upon the complaint of parties alleging a monetary taking, rather than dismissing the complaint without prejudice to an action in the Court of Claims?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law . . .

The Act of October 3, 1972, 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 states:

> Pub.L. 92-456; 86 Stat. 762, 763; 25 U.S.C. 1291-97:
>
> "The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.
>
> "The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:
>
> "(a) they were born on or prior to and were living on October 3, 1972; and
>
> "(b) they are citizens of the United States; and
>
> "(c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or
>
> "(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary.

"All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant.

"(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is

authorized by the tribal governing body and approved by the Secretary of the Interior.

"(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body; *Provided*, That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

"Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

"None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

"The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title."

STATEMENT

Prior to the arrival of European colonists, the Delaware Nation resided in an area stretching from lower New York state to the eastern Mississippi valley of what is now the United States.

In 1793, the Governor of New Spain persuaded some members of the Delaware Nation to move from the present states of Ohio and Indiana to other land in what is now Missouri. English-American settlement continued the dispersing pressure upon the Delawares and forced substantial numbers of Delawares in Missouri to move as far west as the present states of Arkansas, Texas and Oklahoma. While details of this geographical scattering are unavailable, the essence of the situation was that by the end of the first decade of the Nineteenth Century, the Delaware Nation, as a cohesive unit, had ceased to inhabit any one area of land on the North American continent.

In these circumstances, the United States negotiated, in 1818, a treaty, commonly called the Treaty of St. Mary's, 7 Stat. 188, forcing the Delawares to relinquish title to their lands in Indiana in exchange for lands west of the Mississippi River. The larger body of the Delawares eventually removed to this tract of land, located in what is now Missouri, and remained until 1829. J.S. App. p. 11-12; 406 F.Supp. 1309-1317.

In 1829, the Delaware Nation entered into a "supplemental" treaty to the 1818 treaty, 7 Stat. 327. Under the terms of this 1829 treaty, the Delaware Nation exchanged lands in Missouri for a reservation in Kansas which was stated, in the treaty, to be in partial payment for the cession, by the Delawares, of their lands in Indiana.

A substantial number of the Delawares removed to the Kansas reservation and remained there from the third decade of the Nineteenth Century until 1866. A substantial portion of the tribe, however, was forced as far south as Arkansas, Texas and Oklahoma.

In 1854, 1860, and 1866, the United States again entered into treaties with the Delaware Tribe.[2] Under the provisions of the 1854 treaty, 10 Stat. 1048, the Delaware Tribe ceded to the United States a large portion of its Kansas lands. The portion remaining unceded and unoccupied was to be sold by the United States at public auction and the proceeds were to go to the Delaware Tribe, subject to Congress' power to direct distribution of the proceeds in such manner as Congress deemed appropriate. 10 Stat. 1048, 1051.

Contemporary records, introduced into evidence before the Indian Claims Commission and the Court of Claims, demonstrate that the government was acutely aware of the presence of large numbers of the Delaware Tribe southwest of the Kansas Reserve. These records also show that one of the abiding objects of the Principal Chief of the Delaware Nation, Chief William Anderson, was to unite the scattered tribe. The Senate Report relevant to the statute here at issue,[3] distilling the findings of fact made by the Indian Claims Commission, observes that "Anderson, during his long life signed no less than nine Delaware treaties, . . . His entire life is testimony to his efforts to unite his

---

[2] The terms "Tribe" and "Nation" are substantially interchangeable in the present context.

[3] S. Rep. No. 1518, 90th Cong. 2d Sess., p. 10.

scattered nation; first on land in Indiana and later on the Delaware Reserve in Kansas. . . ." The Senate Report, describing the status of the southern Delawares, who today comprise the Absentee Delaware Tribe of Western Oklahoma, observed that: "a group of Delawares on its way from Texas to Kansas in 1853 obtained permission from the Choctaw Nation in Oklahoma to stay on its lands as 'tenants at will' reserving the right to move to Kansas at any time."[4] Immediately prior to the negotiation of the treaty of 1854, the Delaware Tribe's members resided throughout the area stretching from the middle part of Kansas to Northern Texas. Although "geographically scattered . . . there was actually a strong inner cohesion; lines of communication were stretched thin but did not break."[5] The cohesiveness is apparent from the fact that one of the Absentee Delawares, John Conner, became Principal Chief of the entire Delaware Tribe while living with the Absentee Delawares on land far south of the Kansas Reserve.[6]

This, briefly sketched, is the situation which existed immediately prior to the time of the negotiation of the Treaty of 1854, 10 Stat. 1048, between the United States and the Delaware Tribe. The essence of the Treaty of 1854, following a familiar pattern, was to remove the Delawares from land which white settlers had come to covet.

As discussed, under the provisions of the 1854 treaty the Delawares ceded to the United States a large portion of their Kansas lands. The portion remaining unceded and

---

[4] S. Rep. No. 1518, 90th Cong. 2nd Sess., p. 12.

[5] *Id.*

[6] *Id.*

unoccupied was to be sold by the United States at public auction and the proceeds were to go to the Delaware Tribe, subject to Congress' power to direct disposition of the proceeds in such manner as Congress deemed wise.[7]

In 1860, the government negotiated a treaty with the Delaware Tribe by which all remaining Delaware land in Kansas was to be surveyed; 80-acre plots were to be distributed to members of the tribe; and the remaining surplus lands were to be sold. 12 Stat. 1129. Article IV of this treaty may be mentioned for its demonstration of the contemporaneous understanding of the structure of the Delaware Tribe. It stated:

> "Whereas, some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about 200 of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return, the allotments set apart for them belong to the nation in common." 12 Stat. 1129, 1130-31.

This contemporary recognition of the determination of the Delaware Tribe to remain, as much as possible, unified,

---

[7] Article VIII of the Treaty, 10 Stat. 1048, 1051, provided: "Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of such lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body seem just and proper."

has previously been discussed by the Court of Claims, *Delaware Tribe of Oklahoma and Absentee Delaware Tribe of Oklahoma* v. *United States,* 130 Ct.Cl. 782, 788; 128 F.Supp. 391, 399 (1955) and need not be repeated here.

In 1866, pursuant to another treaty, 14 Stat. 793, the Delaware Tribe was required to remove to Oklahoma. Article IX of the Treaty, 14 Stat. 793, 796, contained the "expatriation clause" which has become important here. The clause provided that those Delawares who were demonstrably competent, had established such competence over a period of five years and could so prove to the satisfaction of a United States District Court, could resign from the tribe, renounce any future participation in Delaware tribal councils, accept United States citizenship and accept from the United States a grant of title in fee to an eighty-acre tract of land in Kansas. This provision was especially important to those Delawares who were married to whites, had families and did not wish to remove their families to the Indian Country. The treaty (Art. IX) stressed that the resigning Delawares *"shall cease to be members of the Delaware Tribe, and shall not further participate in their councils nor share in their property or annuities."* 14 Stat. 793, 796. (emphasis added).

Pursuant to Article IX, a registry was prepared of those Delawares who elected to renounce their Delaware citizenship, accept United States citizenship and abandon forever their connection with the Delaware Tribe. The apparent reason for preparation of the registry was that United States citizenship and citizenship in an Indian tribe were, at that time, incompatible. *Elk* v. *Wilkins,* 112 U.S.

94, 103-106. The names of 21 adults appear on this registry.[8] The registry also contains the names of 49 minors who had been born to those adults who remained in Kansas. These children of the expatriated Delawares were formally granted United States citizenship by the Act of June 22, 1874, 18 Stat. 146, 175.

A century later, after the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Oklahoma brought suit in the Indian Claims Commission for breach by the United States of the Treaty of 1854, the Commission, following its determination that the Treaty had been breached through the failure of the United States to sell Delaware lands at public auction in accordance with the provisions of the Treaty, entered a judgment in 1969 for $9,168,171.13.[9]

Congress, thereafter, transformed this final award into the distribution statute, 25 U.S.C. (Supp. IV) 1291-1297, at issue herein.

Appellees, descendants of the "Kansas Delawares", *i.e.*, those who elected to resign from the Tribe and remain in Kansas in 1866, or of children of those resigning Delawares, claim that 25 U.S.C. (Supp. IV) 1291-1297 is void for failure to include them within its distributive provisions. The exclusion came about because Congress determined to limit the distribution provisions to the two federally recognized Delaware Tribes in Oklahoma and to their statutorily-

---

[8] The practice of preparing such a registry was, at the time, relatively common. See, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106.

[9] *Delaware Tribe of Indians and Absentee Delaware Tribe of Indians* v. *United States*, 21 Ind.Cl.Comm. 344 (1969).

defined tribal membership. Congress distributed ten per cent of the funds so awarded directly to the two tribal governments to be used for tribal purposes, and employed two rolls, a 1906 payment roll and a 1940 census roll, as the basis for defining membership in the Delaware Tribes. The statute defines as beneficiaries those Delawares whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary of the Interior on April 20, 1906" or those Delawares whose "name or the name of a lineal ancestor is on or eligible to be on the constructed base census role as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior." 25 U.S.C. (Supp. IV) 1292(c).

Appellants herein are members of the governing body of the descendants of those Delawares who lived in Arkansas, Texas and Oklahoma during the middle of the Nineteenth Century; who have maintained tribal identity, having Chiefs and a Tribal Council until the present day. Appellants represent a Tribe which has, since 1957, been federally recognized, with governing documents and a constitution approved by the Secretary of the Interior. J.S. App. 12-13; 406 F.Supp. 1309, 1318.

A majority of the District Court held that the statute was violative of the Fifth Amendment for failure to include the descendants of the expatriated "Kansas Delawares", holding the constitutional question to be one of ancestry in the ancient tribe, traced from the "time of the wrong", rather than federal tribal recognition or tribal membership.

From that judgment, the present appeal has been brought to this Court.

SUMMARY OF ARGUMENT

A. 1. 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 is a statutory plan distributing a judgment of the Indian Claims Commission to the two modern federally recognized Delaware Tribes, as entities, and to those tribal Delawares whom Congress defined, for purposes of the statute, as members of the federally recognized Delaware Tribes. Appellees, t' "Kansas Delawares", are descendants of expatriat wares who long ago elected to resign from the tribe, and the minor children of such expatriates who were accorded United States citizenship in 1874, thereby terminating their tribal membership. *Elk* v. *Wilkins,* 112 U.S. 94. The "Kansas Delawares" contend that despite the expatriation of their ancestors and their lack of membership in either modern tribe, they must, as a constitutional matter, stand on equal footing with members of the contemporary federally recognized Delaware Tribes, as these members were defined by Congress for purposes of this statute, and that their exclusion from the distribution statute was, therefore, violative of the Due Process Clause of the Fifth Amendment.

We submit that the statute here at issue in no way offends the Due Process Clause of the Fifth Amendment.

The "Kansas Delawares' " complaint is a classic illustration of the type of policy making determination regarding Indian tribes which constitutes "essentially a sociological problem, not a legal one," *Northwestern Shoshone Tribe* v. *United States*, 324 U.S. 335, 355 (Jackson, J., concurring) and which is properly resolved by Congress rather than by rigid constitutional rulings under the Due Process Clause. This view accords with the Court's historic reluctance to

attempt to impose judicially fashioned standards upon such an inherently political function as the appropriation of tribal monies to Indian tribes and their members who are under the jurisdiction of the Department of the Interior and the Bureau of Indian Affairs. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308 (congressional power over Indian affairs is "political and administrative in its nature, [and] the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 ("plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.") The present statute falls precisely within the ambit of these holdings. See especially, 25 U.S.C. (Supp. IV) 1294, appropriating ten per cent of the tribe's funds directly to the Absentee Delaware Tribe of Western Oklahoma's tribal government for expenditure "for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior." Moreover, the principles of *Cherokee Nation* and *Lone Wolf* are especially applicable here since the expatriated "Kansas Delawares'" complaint turns crucially upon construction of two treaties between the United States and the Delaware Tribe. Treaty of 1854, 10 Stat. 1048, 1051 and Treaty of 1866, 14 Stat. 793. See especially, Article IX of the Treaty of 1866, 14 Stat. 793, 796, providing that the ancestors of the expatriated "Kansas Delawares" would receive their pro rata share of tribal assets "*then* held in trust" by the government and further providing that the expatriates "shall *cease to be members*

of the Delaware Tribe, and shall not further participate in their councils *nor share in their property or annuities.*" Even assuming it is possible to interpret these treaties in such a way as to conclude that Congress could *allow* the "Kansas Delawares" to share in this distribution statute, nothing in the Constitution *requires* that Congress include these non-members together with the defined members of the two modern Delaware Tribes. See, *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 267-268, 315 F.2d 906, 913-914 (1971) ("The Indian Claims Commission Act requires that awards be made, not to individual descendants of tribal members of the time of the taking, but to the tribal entity or entities today.") The lack of judicially manageable standards for adjudication of the inherently political issues presented by the "Kansas Delawares", and the inappropriateness of circumscribing Congress' plenary power over Indian affairs in the present case is well illustrated by the fact that even the majority of the divided court below, willing to grapple with these questions, was unwilling to grant the relief the "Kansas Delawares" sought, *i.e.*, to include them within this distribution statute. Rather, admitting that the manner of distribution would have to be devised by Congress, the majority below entered a prohibitory injunction vitiating the entire statute. This remission of the entire matter to Congress is itself telling proof of the correctness of Judge Daugherty's dissenting statement that "by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint." J.S. App. p. 80; 406 F.Supp. 1309, 1357. Such contentions as the "Kansas Delawares" may wish to put forth for

allowing them to receive tribal funds or property, despite the terms of the Delaware Treaty of 1866, and their non-membership in the modern Delaware Tribes, are properly presented to the Subcommittees on Indian Affairs of the Senate and the House of Representatives, not to the Judiciary.

2. The funds involved herein are clearly tribal, rather than individual in nature since they redress an injury done to the Delaware Tribe, not to individuals. *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 270-271, 315 F.2d 906, 913-914; *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 458, 490 F.2d 935, 954. And it is well established that Congress may define tribal membership for purposes of a particular statute in a manner which does not precisely coincide with the membership requisites of the tribe. *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 490-491. Congress plainly acted well within its constitutional power in electing not to include a particular blood quantum requirement as a requisite for membership in the Absentee Delaware Tribe of Western Oklahoma for purposes of this distribution statute, and in accepting instead those Delawares who were on or eligible to be on the tribe's 1940 census roll. *Sizemore* v. *Brady*, supra. Such merit as there may be (and we submit there is none) in the "Kansas Delawares" strained theories for their inclusion in any distribution statute to the Delaware Tribes are properly resolved "by appeal to [Congress] . . . not the courts." *Lone Wolf* v. *Hitchcock*, supra, 187 U.S. 553, 568.

Congress plainly acted well within its broad constitutional power over Indian affairs in enacting this distribu-

tion statute and the statutory plan should, therefore, be upheld as an exercise of a congressional function that has historically been confided to congressional judgment. *Stephens* v. *Cherokee Nation*, supra; *Lone Wolf* v. *Hitchcock*, supra.

B. The "Kansas Delawares'" suit seeks to prevent the two federally recognized Delaware Tribes from receiving funds appropriated to the tribes, and the tribal members. The attempt to enjoin this distribution should be held barred by the holdings of this Court in *Turner* v. *United States*, 248 U.S. 354, 358 and *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 512-513 that Indian tribes are immune from suit without congressional consent. The "Kansas Delawares" cannot avoid the force of *United States Fidelity and Guaranty Company's* holding by seeking a declaratory judgment, *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 241; nor can they circumvent these holdings by having a suit certified as a class action. *Eisen* v. *Carlisle and Jaquelin*, 417 U.S. 156, 177. Nor should the "Kansas Delawares" be allowed to do indirectly what they cannot do directly, *i.e.*, engage the tribal governments in litigation over appropriated funds, merely by naming the Secretary of the Interior a party defendant and seeking injunctive relief against him. *Cf.*, *Mine Safety Appliances Company* v. *Forrestal*, 326 U.S. 371, 373-374; *Tewa Tesuque* v. *Morton*, 498 F.2d 240, 242 (10th Cir., 1974); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324 (9th Cir., 1975), cert. den. sub. nom. *Susenkewa* v. *Hathaway*, ___ U.S. ___ (March 29, 1976); *Means* v. *Wilson*, 522 F.2d 833, 838 (8th Cir., 1975). Particularly in regard to federally recognized tribes, allowing a suit to proceed against the Secretary of the Interior,

or the Commissioner of Indian Affairs, as a nominal defendant would reduce *United States Fidelity and Guaranty Company's* principled, jurisdictional holding to a form of words. The fact that the Absentee Delaware class, as defined —at the "Kansas Delawares'" instance—by the District Court in its order overruling defendants' Motion to Dismiss and Motion for Summary Judgment, intervened in the companion *Frazier* litigation should not affect a rule which this Court held in *United States Fidelity and Guaranty Company* to be jurisdictional. The years of litigation, and the long history through three District Courts and the Judicial Panel for Multi District Litigation, which this case has taken are forceful testimony to the need for this Court to reiterate the holding of *United States Fidelity and Guaranty Company* in the present context and to forbid that holding to be evaded by the device of naming a government officer as a nominal defendant.

C. 1. The distribution statute challenged by the "Kansas Delawares" follows a familiar pattern in distinguishing between those whom Congress regarded as members of the two federally recognized Delaware Tribes and a group of persons—the "Kansas Delawares"—whose ancestors long ago expatriated themselves from the tribe pursuant to a treaty between the tribe and the United States. See, Treaty of July 4, 1866, Art. IX, 14 Stat. 793, 796 (ancestors of "Kansas Delawares", upon resignation from the tribe, "shall cease to be members of the Delaware Tribe, and shall not further participate in their councils nor share in their property or annuities.") It is settled that Congress' broad power over Indian affairs includes the power to delineate membership in Indian tribes for purposes of a particular statute

so long as the persons included have a relationship to the tribe. E.g., *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813-814 (E.D. Wash.) *affirmed*, 384 U.S. 209. F. Cohen, *Federal Indian Law* (Rev. Ed., 1958) p. 43. Congress' determination to distribute this Delaware Indian Claims judgment to the two modern federally recognized Delaware Tribes, based upon reasonable, objective criteria (two rolls) for defining the tribes' members, was clearly within its expansive constitutional power over Indian affairs. E.g., *Simmons* v. *Eagle Seelatsee*, supra, 244 F.Supp. 808, 814, *affirmed*, 384 U.S. 209. (Congress may draw a line "between . . . those properly to be regarded as continuing members of the Tribe [for purposes of the statute at issue] and those who are not.") A congressional decision to favor federally recognized Indians under the supervision of the Bureau of Indian Affairs over persons who are not members of a federally recognized tribe and who have no contact with the Bureau of Indian Affairs is well within Congress' plenary power in regard to Indian tribes and in no way offends the Due Process Clause of the Fifth Amendment. *Morton* v. *Mancari*, 417 U.S. 535, 552-553 and n. 24. ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. . . . The preference is not directed toward a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense the preference is political rather than racial in nature.") The "Kansas Delawares' " conten-

tion that *Mancari* is limited to the precise facts which were before the Court in that case is without merit. The Court's decisions in *Fisher* v. *District Court*, ... U.S. ....., No. 75-5366 (March 1, 1976) slip opinion at 8-9 and *Moe* v. *Confederated Salish and Kootenai Tribes*, ... U.S. ....., No. 74-1656 (April 27, 1976) slip opinion at 15-16, demonstrate that a distinction between those Indians who are considered by Congress to be members of federally recognized tribes and those who are not has vitality as a principled judgment which is, necessarily, broad in its application. The "Kansas Delawares' " suggestion that the principles of *Mancari* and its progeny are limited to legislation affecting reservation Indians is clearly erroneous in the context of the present case. The statute here at issue concerns federally recognized tribes in Oklahoma. The Court has consistently recognized the unique status of BIA supervised Indians in Oklahoma and the absence of Indian reservations within Oklahoma. E.g., *Morton* v. *Ruiz*, 415 U.S. 199, 201, 204, 212, 218-219; *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 718. ("The situation of Indians in . . . Oklahoma has historically been unique." *Morton* v. *Ruiz*, supra, at 212.) See generally, F. Cohen, *Federal Indian Law*, (Rev. Ed.) 985-1051, "Special Laws Relating To Oklahoma."

2. The well established power of Congress to define membership in Indian tribes and to distinguish between those who are to be considered members of federally recognized tribes and those who are not, has special applicability where, as here, Congress' decision excluded from a Delaware claims distribution statute only descendants of expatriated Delawares, and the minor children of such expatriates, who resigned from the tribe and relinquished any

right to be considered members of the tribe more than a century ago. *Halbert* v. *United States*, 283 U.S. 753, 762-763 ("... [i]n the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended.") When considered in conjunction with the fact that the "Kansas Delawares" are not members of either modern federally recognized Delaware Tribe and are not under any supervision of the BIA or other agencies of the Department of the Interior, both the power of Congress to exclude these descendants of expatriated Delawares, and a plainly rational basis for doing so, is clear. See, *Simmons* v. *Eagle Seelatsee*, supra. The "Kansas Delawares' " contention that Congress did not intend to delineate membership in the two federally recognized Delaware Tribes by the statute now at bar, nor to limit distribution to members of these tribes, is refuted by the words of the statute itself. See especially, 25 U.S.C. (Supp. IV) 1294 appropriating ten per cent of the tribes' funds directly to the tribal governments for expenditure "for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior." Finally, the "Kansas Delawares' " argument that Congress was constitutionally compelled to include within a distribution statute all descendants of the ancient tribe, traced from 1854, the "time of the wrong," without regard for intervening historical events, is unsupported by either reason or authority. E.g., *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 268-270, 315 F.2d 906, 913-915. See also, *Weinberger* v. *Salfi*, 422 U.S. 749, 776-778.

D. Whatever independent claims the "Kansas Delawares" contend they might possess against the United States could only be adjudicated in an action before the Court of Claims and in no event would they provide a basis for enjoining the present statute. *Hurley* v. *Kincaid*, 285 U.S. 95; *Regional Rail Reorganization Act Cases*, 419 U.S. 102.

ARGUMENT

I.

APPELLEES' SUIT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

The threshold question for decision is whether the issues framed by the pleadings in the District Court present a justiciable controversy for resolution by the Court. The holding of the majority below that a justiciable controversy was present on the facts presented here is without precedent. The fact that no precedent can be found to sustain appellees' contention is persuasive evidence that the claim appellees present is not justiciable. In *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565, the Court reiterated the rule that "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." A majority of the court below held that *Lone Wolf* did not control the present case. Judge Daugherty, dissenting, held that it did; that the case was "within the plenary power of Congress in relation to Indians and not justiciable . . . [since] *Lone Wolf* has not been reversed and the decisions following it are too numerous to cite." J.S. App. 82; 406 F.Supp. 1309, 1353.

The majority below used two sentences to "distinguish" *Lone Wolf* from the case at bar.[10]

But the essence of the District Court's opinion was its view that *Lone Wolf* had been impliedly overruled by the reasoning of *Baker* v. *Carr*, 369 U.S. 186, 210-215; J.S. App. 28-31; 406 F.Supp. 1309, 1326-1327. The latter approach had, at least, the virtue of candor. The purported distinctions between the case framed on the pleadings below and *Lone Wolf* cannot withstand analysis.

Of course, it is obviously true that 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 does not embody any present policy determination similar to that found in the function of negotiating a treaty. No statute dealing with Indian affairs since 1871 has involved such a policy determination.[11]

Since Indian treaties are a "closed account in the constitutional law ledger,"[12] absence of a policy determination of the sort involved in the treaty making function is an absence found in every statute which has been brought before the Court in this century.

Underlying some of the District Court's reasoning, is, apparently, the inarticulate premise that this particular

---

[10]The "distinguishing" sentences are: "There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function . . . [and] However, the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress." J.S.App.p.30; 406 F.Supp. 1309, 1327.

[11]Congress put an end to the practice of making treaties with the Indian tribes by the Act of March 3, 1871, 16 Stat. 544, now codified as 25 U.S.C. 71.

[12]E Corwin, (Ed.) *Constitution of the United States of America, Annotated* (1953) P. 432.

case somehow does not involve the delicate political considerations associated with interpretation of treaties. This is incorrect. The treaty between the United States and the Delaware Nation of July 4, 1866, 14 Stat. 793 upon which appellees base both their present class and their claim of entitlement provided that appellees' ancestors would receive their pro rata share of tribal assets "*then* held in trust by the United States." 14 Stat. 793, 796. The court below, as a predicate to reaching its judgment was required to hold that the phrase "*then* held in trust by the United States" did not mean what it appears to say, i.e., that the word "then" did not have the effect of waiving any future claims which descendants of the resigning Delawares might later assert.

The majority below found this interpretation of the treaty "strained" and invoked the rule that treaties between Indian tribes and the United States are to be construed strictly against the United States.

Passing for the moment the fact that the Court has already this Term held this canon of construction to have no place in a dispute between different classes of Indians, *Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ....., No. 75-145 (May 19, 1976), slip opinion, n. 7, the fact remains that the District Court was compelled to do what it disclaimed the necessity of doing: interpreting the policy implications implicit in the provisions of a treaty between the United States and the Delaware Tribe.

Indeed, it is scarcely an exaggeration to suggest that the construction which the majority below placed upon the phrase, "then held in trust by the United States" combined

with the majority's concession that both this treaty and the treaty between the United States and the Delaware Tribe, negotiated and ratified in 1854, 10 Stat. 1048, were involved "indirectly in this case" J.S. App. p. 30; 406 F.Supp. 1309, 1327 make a "distinction" between the case at bar and *Lone Wolf*, a distinction without a difference. Surely a distribution statute such as 25 U.S.C. (Supp. IV) 1291-1297 including and excluding certain persons as members of a particular Indian tribe for purposes of a monetary distribution and further determining what proportion of the distribution is to go directly to the tribal governing bodies themselves is quintessentially the type of policy making determination presenting "essentially a sociological problem, not a legal one", *Northwestern Shoshone Tribe* v. *United States*, 324 U.S. 335, 355 (Jackson, J., concurring), which is best fitted for the authority of Congress to resolve, just as it resolved the sociological and cultural problems which formed the essence of *Lone Wolf* v. *Hitchcock*, supra, and such related cases as *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308, and *Sizemore* v. *Brady*, 235 U.S. 441, 447. As *Cherokee Nation* and *Lone Wolf* held, the congressional power to make such determinations is "political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation* v. *Hitchcock*, supra, 187 U.S. 294, 308.[13]

---

[13] Of course, as argued at considerable length by defendants below, and as stated by Judge Daugherty in dissent, if a particular piece of Indian affairs legislation is thought to occasion inequity "relief must be sought by appeal to [Congress] for redress, and not the courts." *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 568.

A second basis of the District Court's rationale for disregarding *Lone Wolf* and its progeny was that the challenged statute did not implicate the "discretionary exercise of the guardianship function [in regard to Indian tribes] by the Congress." J.S. App. 30; 406 F.Supp. 1309, 1327. This is plainly incorrect. 25 U.S.C. (Supp. IV) 1294, by its terms, apportions ten per cent of the funds appropriated to: "*the Absentee Delaware Tribe of Western Oklahoma* . . . to remain to the credit of the Tribe in the United States Treasury, and [such funds] may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of Interior." This is a considerably *more* express exercise of the guardianship function of Congress in regard to Indian tribes than that sustained in *Cherokee Nation* v. *Hitchcock*, supra, and surely a more express determination than that contained in the allotment statute at issue in *Sizemore* v. *Brady*, 235 U.S. 441, 447, where the Court reminded again that Congress "possessed full power . . . to assume full control over them [the tribes] and their affairs, *to ascertain who were members of the Tribe and to distribute the lands and funds among them* . . ." (emphasis added) and a use of the guardianship function as express as that found in the statute at issue in *United States* v. *Jim*, 409 U.S. 80, 82-83.

Since the majority below conceded that there was "an element of such a relationship" in 25 U.S.C. (Supp. IV) 1294, J.S. App. 30; 406 F.Supp. 1309, 1327, the authority of *Lone Wolf, Cherokee Nation, Sizemore* and *Jim*, would seem to lead inexorably to the conclusion that 25 U.S.C. (Supp. IV) 1291-1297, was an exercise of Congress' plenary

power in regard to Indian affairs and, thus, did not present a justiciable controversy for resolution.[14] The majority erred in holding to the contrary.

The District Court misconceived both the reasoning of *Baker* v. *Carr* and the applicability of *Baker's* rationale to *Lone Wolf* and its progeny. *Baker's* dictum regarding the *status* of Indian tribes, derived from quotations contained in *United States* v. *Sandoval,* 231 U.S. 28, 46, was limited to the observation that "Congress may not bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe . . . [because] the courts will strike down any heedless *extension* of that label . . ." 369 U.S. 186, 216-217, quoting *United States* v. *Sandoval*, supra (emphasis added), is merely a re-emphasis of the long established principle that Congress' power over Indian affairs is unique and that it must be limited to those matters which are "distinctly Indian." *Id.* It is undisputed that 25 U.S.C. (Supp. IV) 1291-1297 concerns a matter which is as "distinctly Indian" as any imaginable; that no question of *extension* of the plenary power of Congress to non-Indians is remotely implicated in the present case, and, it follows, that *Baker's* dictum has no place here.

---

[14]We raise no question whether appellees' complaint presented a claim "arising under" the Constitution, see, *Bell* v. *Hood,* 327 U.S. 678, nor whether Indians—tribal or non-tribal—may seek judicial review of an alleged deprivation by government of a specific personal right expressly granted by the Constitution, or by federal statute. *Cf., Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661.

Whatever the effect of *Baker's* dictum may be in other contexts,[15] it obviously has no application to this statute, and the reliance of the District Court upon *Baker* as authority for the inference that *Lone Wolf* had been impliedly overruled was erroneous; no case in this Court has suggested, by implication or holding, that the mass of federal case law built upon *Lone Wolf* and reaffirmed time and again since that decision, has been *sub silento*, overruled. But, if the holding of *Lone Wolf* that Congress' power over Indian affairs is "a political one, not subject to be controlled by the judicial department of the government . . ." is, as we submit, still authoritative law, it mandates reversal of the District Court's decision. As Judge Daugherty argued below, and as we have attempted to demonstrate, any "distinction" between the present case and *Lone Wolf* is a distinction of form, not of substance. *Cf., Hicks* v. *Miranda,* 422 U.S. 332, 344-345.[16]

The longstanding holding of *Lone Wolf* and its progeny has, we submit, been a recognition on the part of the Court that certain functions, including decisions involving federally recognized Indian tribes, are so inherently political in their nature, function and purpose that the Judiciary has no principled standards for review and, therefore, that they

---

[15]Since *United States* v. *Sandoval*, supra, held that the Pueblos of New Mexico were "Indians" for purposes of federal law, we are aware of no decision in which the question of extension of Congress' plenary power over aboriginal inhabitants of the United States has been raised. *Cf., United States* v. *Native Village of Unalaklect,* 188 Ct.Cl. 1, 411 F.2d 1255 (1969), where the Court of Claims held that Congress intended to include claims by aboriginal inhabitants of Alaska (Eskimos and Aleuts) within the scope of the Indian Claims Commission Act, 60 Stat. 1049, 1050, 25 U.S.C. 70-70v.

[16]J.S. App. 82; 406 Supp. 1309, 1353.

fall within the narrow category of cases which present a "texturally demonstrable commitment" to a coordinate political branch of government. Compare, *Baker* v. *Carr*, 369 U.S. 186, 217 with, *Tiger* v. *Western Investment Company*, 221 U.S. 286, 310-311.

We believe the action of the majority below confirms the correctness of what we perceive to be this Court's historic reluctance to impose judicially fashioned standards upon so intensely political a function as the appropriation of monies from the Treasury to federally recognized tribes. The District Court did *not* grant the relief the "Kansas Delawares" sought; that is, the District Court did not enlarge the pool of beneficiaries of the statute to include the "Kansas Delawares." Rather, the District Court, admitting that "a formula [for proper distribution] will have to be determined by statute", J.S. App. p. 26, n. 22; 406 F.Supp. 1309, 1325, entered a prohibitory injunction voiding the entire statute, including the ten per cent of funds going directly to the Tribe, and leaving its prohibitory injunction in effect so long as Congress has not undertaken to enact amendatory legislation.[17]

Thus, even the court below, willing to grasp the nettles of the uniquely political issue here presented, was unwilling to grant the requested relief, recognizing, we submit, that so inherently political a function is within the province of Congress, not the Judiciary.

Yet, this remission to Congress of the entire issue is itself a forceful indication of the correctness of Judge

---

[17]See paragraph 4 of the court's judgment of December 18, 1975. J.S. App. p. 4.

Daugherty's dissenting statement that ". . . by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint." J.S. App. p. 90; 406 F.Supp. 1309, 1357. *Cf., Baker* v. *Carr,* 369 U.S. 186, 215 n. 43: "Chief Justice Marshall's dictum [in *Cherokee Nation* v. *Georgia* (US) 5 Pet. 1, 20] that 'it savours too much of the exercise of a political power to be within the proper power of the judicial department, was . . . addressed . . . to the breath of the claim asserted and the impropriety of the relief sought.' "

We submit that precisely these considerations are present in the case at bar, and that they should lead to a reversal of the unprecedented judgment entered by the District Court.

II.

THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA, AND ITS GOVERNING BODY, BEING IMMUNE FROM SUIT, THIS CASE SHOULD HAVE BEEN DISMISSED BY THE DISTRICT COURT.

Appellants presented, in their Jurisdictional Statement, the question whether the District Court had improperly disregarded the immunity of the tribe from suit, through the device of directing its injunctive process only against appellant Kleppe, as Secretary of the Interior, and entering a judgment which expressly disclaimed being a binding adjudication against the tribes or their tribal authorities, while—at the same time—binding them by binding members of the tribal government as "representatives" of their "class," i.e., the tribe. Because this Court held in *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 512-513 that the immunity of an Indian tribe from suit was a jurisdictional bar, and that it rendered an otherwise valid judgment absolutely void, we continue to urge this point. We do note, however, that appellants intervened—as a class—in the companion *Frazier* case in order to achieve a final adjudication in that cause, and in order not to face re-litigation in the *Frazier* suit of the same issues which were before the Court in the *Weeks* case. In the event the Court is of the opinion that *United States Fidelity and Guaranty Company*, supra, does not stand as a jurisdictional bar in the context of the present case, where there has been intervention, the remainder of the argument under this Proposition may be disregarded. If *United States Fidelity and Guaranty Company's* holding is jurisdictional, and if it should properly be held to be applicable in the circum-

stances here presented, the remainder of the argument in Proposition II is pertinent.

We submit the District Court erred in employing the class action procedures of Fed. R. Civ. Proc. 23(b) (1) (B) and 23(b) (2), and the device of a declaratory judgment to avoid dismissing this action. The essential result is to contravene the Court's holding in *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506, 512-513. The District Court conceded that "Indian Nations are exempt from suit without congressional authorization" and conceded also that a tribe could not be "sued indirectly by suing tribal officers or the United States as trustee or guardian of the tribe." J.S. App. p. 27; 406 F.Supp. 1309, 1325. This concession would seem to have led the District Court to dismiss the complaint on the authority of e.g., *United States* v. *United States Fidelity and Guaranty Co.,* supra, and *Turner* v. *United States,* 248 U.S. 354, 358. The District Court did not do so. The Court's reasoning is best set forth by quotation:

> "The Weeks complaint alleges as to the Cherokee, Delaware and Absentee Delaware Business Committees that each of the members of the committee (being separately named) is a Delaware Indian and that they are each a representative of their respective subclasses, the Cherokee Delawares and the Absentee Delawares." J.S. App. p. 27; 406 F.Supp. 1309, 1326.

After remarking that individuals are not immune from suit because they happen to be of Indian blood, the court held it had the option to "entertain the suit against the individually named Indian defendants, in their individual capacities, and that we may also properly recognize them

as representatives for class action purposes . . . and enter a declaratory judgment of the rights of the individuals constituting the classes." J.S. App. p. 27; 406 F.Supp. 1309, 1326. No authority was cited for this sleight of hand. Indeed, appellees, in their "Motion to Dismiss Appeal"[18] concede that *United States Fidelity and Guaranty Company* "reaffirms the time honored principle that the United States and the Indian Nations *in tutelege* are immune from suit." (emphasis in Motion) Appellees seek to distinguish *United States Fidelity and Guaranty Company* on the ground that the Absentee Delaware Tribe of Western Oklahoma does not meet this criteria and that "no tribal properties or issues relating to the administration of Indian Affairs . . ." are presented here. These suggestions are erroneous.[19]

The existence of the Declaratory Judgment statute, 28 U.S.C. §2201 et seq, a purely procedural device, (and one in existence at the time *United States Fidelity and Guaranty Company* was decided) does not alter the substantive requirement that there be a controversy "admitting of specific relief through a decree of a conclusive character . . . "*Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 241. Yet the majority below was at pains *not* to find a controversy admitting of specific relief through a decree of a conclusive character in regard to appellees as against appellants as an

---

[18]Since appellees do not question the jurisdiction of this Court on appeal, nor (obviously) the justiciability of the issues which appellees presented in their complaint in the District Court, this Motion was, presumably, intended to serve the function of a Motion to Affirm. S.Ct. R. 16(c).

[19]Appellees also contend in their Motion that this action meets the *procedural* requirements of Fed. R. Civ. Proc. 23. As noted in the Jurisdictional Statement, p. 12, n. 9 and p. 22, n. 14, this is not in dispute—it is immaterial.

entity: "[w]e grant no relief against the tribes or *their tribal authorities* as such, and our judgment should not be construed as a *binding adjudication affecting them.*" J.S. App. p. 27; 406 F.Supp. 1309, 1326 (emphasis added). Even accepting this reasoning at face value, it cannot explain the District Court's decision to vitiate that portion of the statute which allocates ten per cent of the funds appropriated to the *tribal governing body itself* for use for tribal purposes together with the rest of the statute. The court's denial of these appellants' Motion for Partial Final Judgment as to these funds stated only that the statute "is not severable, and . . . the unconstitutional exclusion thereby of the Kansas Delawares renders the same invalid as a whole." J.S. App. p. 22-23, n. 20; 406 F.Supp. 1309, 1323. The court concluded that all distribution under the statute, must, therefore, be enjoined. We submit this is precisely the reverse of the correct result. Under the authority of *United States Fidelity and Guaranty Company*, and *Turner*, the tribe, and the tribal authorities are immune from suit. If, as we submit, and as the District Court appears to have impliedly conceded, distribution under 25 U.S.C. (Supp. IV) 1294 could not be enjoined, the conclusion would seem to be that no injunction could properly issue. The point may be illustrated by observing that if Congress had elected to distribute all, rather than a specified percentage, of the funds to the tribal governing bodies themselves the principle of *United States Fidelity and Guaranty Company* would, presumably, be an absolute bar to a judgment forbidding the tribal governing bodies from dispensing these funds for tribal use. The fact that Congress here elected to distribute a specified portion of these funds to the statutorily defined tribal members and another specified portion

to the tribal governing bodies should not alter the result.[20] If, as the District Court apparently concluded, it does alter the principle of *Turner* and *United States Fidelity and Guaranty Company*, then these cases will remain viable in the present context only if Congress gives up its practice of distributing Indian Claims judgments partially per capita. The trap is then closed by the District Court's conclusion that the Constitution requires Indian Claims judgments to be paid to all those individuals who are lineal descendants of the ancient tribe, as it was composed at the "time of the wrong," a holding which, as the Solicitor General accurately states, almost surely would "prevent the congressional practice of the distributing a portion of an Indian Claims Commission judgment to the existing tribal governments for common tribal needs . . ." *Kleppe* v. *Weeks*, No. 75-1495, Jurisdictional Statement, p. 11. The net effect would be to leave the immunity from suit granted to Indian tribes by *Turner* and *United States Fidelity and Guaranty Company* a form of words whose substance is easily evaded by a resourceful plaintiff.

The "public policy" which exempts Indian tribes from suit, *United States Fidelity and Guaranty Company*, supra, 309 U.S. 506, 512 would thus be eroded, left a promise to

---

[20] As the Solicitor General correctly observes, the lack of precise coincidence between the persons whom the Tribe's constitution specifies as members (those of 1/8 or more blood) and those whom 25 U.S.C. Supp. IV) 1292(c) specifies as members is immaterial. It is settled law that "Congress has the power to specify the persons who are tribal members for purposes of the distribution of tribal funds, as it has done here, *so long as those persons have a tribal relationship.*" *Kleppe* v. *Weeks*, No. 75-1495, Reply Memorandum, p. 3. (emphasis added). This Court has so held on several occasions. See, e.g., *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, *affirming*, 244 F.Supp. 808, 813 (E.D. Wash.).

the ear to be broken to the hope. The importance of maintaining the principle of *Turner* and *United States Fidelity and Guaranty Company* is vividly illustrated by the present litigation: this case arises out of a claim filed with the Indian Claims Commission in 1951 which, six opinions[21] and two appeals later,[22] resulted in a final award in 1969.

Congress, after lengthy public hearings by the House and Senate Indian Affairs subcomittees[23] enacted 25 U.S.C. (Supp. IV) 1291-1297 in 1972; it was signed by the President in 1972; the tribal government made preparations for use of the funds—funds resulting from a claim which had been pending for a quarter of a century. But the tribal government and tribal members found, instead, further litigation. Suit was filed in the District Court for the District of Kansas and, subsequently (but not until after a Temporary Re-

---

[21] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 2 Ind., Cl. Comm. 253 (1953); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 3 Ind. Cl. Comm. 622 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 4 Ind. Cl. Comm. 346 (1956); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 8 Ind. Cl. Comm. 150 (1959); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 18 (1969); *see also*, *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 179 (1970); *and Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 468 (1971).

[22] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 130 Ct.Cl. 782, 128 F.Supp. 391 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 192 Ct.Cl. 906, 427 F.2d 1218 (1970).

[23] The hearings of the House Subcommittee on Indian Affairs were presided over by Rep. Edmondson, of Oklahoma; the hearings of the Senate Subcommittee on Indian Affairs were presided over by Senator Bellmon, of Oklahoma—two men who were vitally interested in the propriety of the payment of this judgment since it concerned two Indian tribal groups residing within their own State.

straining Order restraining the operation of this statute had been entered and the case set for pre-trial conference) voluntarily dismissed.[24] Suit was filed in the District Court for the Western District of Oklahoma (appellee Weeks' case); another suit was filed in the District Court for the Northern District of Oklahoma, and, subsequently consolidated with the suit in the Western District (the *Frazier* litigation). In mid 1973, Judge Eubanks, of the Western District of Oklahoma, after notice to the parties, consulted with Circuit Judge Murrah, Chairman of the Judicial Panel on Multi District Litigation, as to whether that Panel should take some action in regard to consolidation. No order of consolidation by the Judicial Panel on Multi District Litigation was entered, however, and instead, the present consolidated suits were allowed to proceed in the Western District of Oklahoma.[25] All this transpired in 1973—it is now 1976 and, still, there has been no distribution under the statute.

We submit this sort of situation is precisely what the Court foresaw in *United States Fidelity and Guaranty Company*, supra, when it referred to the "public policy" considerations which exempt "the dependent as well as the dominant sovereignties from suit without consent . . ." and which "continues this immunity even after dissolution of the tribal government." We believe it is what the Court meant when it held that "the desirability for complete settlement of all issues between parties, must, we think, yield to the principle of immunity" and that "[*t*]*his reason-*

---

[24]*Church, et al* v. *Morton, et al,* Civ. No. KC 3696 (D. Kan.)

[25]The Panel did enter an order to show cause to which the parties responded. *In Re Delaware Tribe of Indians,* Docket No. 152 (J.P.M.L.)

ing is particularly applicable to Indian Nations with their unusual governmental organizations and peculiar problems." United States v. *United States Fidelity and Guaranty Company*, supra, 309 U.S. 506, 512-513 (emphasis added).

We believe these principles apply here and that they should have led the District Court to dismiss this suit. In this regard, it may be noted that *United States Fidelity and Guaranty Company* laid down its holding in the hardest possible case: a prior judgment had been obtained in a United States District Court in Missouri, had not been appealed, had become final, and was, therefore, "subject to collateral attack only if *void*." *Id.* (emphasis added). This Court held, despite the obvious equities in favor of the Guaranty Company, that the Missouri judgment was void, and reversed a contrary decision of the court below.

We submit that no material facts distinguish this case from *United States Fidelity and Guaranty Company*. The only differences are differences created by appellees, i.e., appellees named the Secretary of the Interior as a party defendant and had this litigation certified as a class action. The majority below instructed that its injunctive process would run only against the Secretary so as to forbid the Secretary from making distribution under the statute, and held that it would grant no relief, nor any binding adjudication, against appellants as a tribe—instead it would enter a declaratory judgment as to the class.

Does naming of the Secretary of the Interior as a defendant or certification as a class action alter the result reached in *Turner* and *United States Fidelity and Guaranty Company*? We submit that it should not.

Surely the presence of the purely procedural devices of Rule 23 and the Declaratory Judgment Act, do not, and could not, alter the substantive holdings of *Turner* and *United States Fidelity and Guaranty Company*. To say that the statutorily defined membership of the Absentee Delaware Tribe of Western Oklahoma is co-terminous with a defined group of people, and that this defined group is large enough to constitute a class for purposes of Rule 23 is merely a truism. It is something else again to say, as did the court below, that all that is necessary to evade the rule that Indian tribes are immune from suit is to certify the persons whom Congress had denominated members of the tribe as members of a class, obtain service upon individual tribal officers as "representatives" of the "class", and then enter a declaratory judgment determining the rights of the class, as against a private plaintiff.[26]

The District Court's use of Rule 23 amounts to an employment of the Rule to achieve an otherwise impermissible substantive result, i.e., an adjudication "declaratory" of the rights of the tribal members, not as tribal members but as members of a "class." Very recently this Court held that Rule 23 does not even authorize a Court "to conduct a preliminary inquiry into the merits of the suit in order to determine whether it may be maintained as a class action." *Eisen* v. *Carlisle and Jaquelin*, 417 U.S. 156, 177. In

---

[26]Appellees' suggestion that the Absentee Delaware Tribe of Western Oklahoma does not fit *United States Fidelity and Guaranty Company's* holding because it is not an Indian Tribe "in tutelege" is without merit. Even an *express* termination of federal supervision over Indians by Congress does not affect their status as a Tribe. *Menominee Tribe* v. *United States*, 391 U.S. 404, 410-411, *affirming*, 179 Ct.Cl. 496, 388 F.2d 998.

Eisen, the Court noted that this purportedly procedural device had, in fact, a substantive effect, to-wit, it might result in "a preliminary determination of the merits [to the] substantial prejudice of a defendant. . . ." The Court held that Rule 23 provided no support for such a result. We submit the present appeal presents an *a fortiori* case. It was, at least, a respectable argument that the preliminary evaluation of the merits which the District Court undertook in *Eisen* could be described as a procedural mechanism designed to effectuate the purposes of Rule 23. We submit no serious argument can be made that a holding which materially affects the substantive holdings this Court laid down in *Turner and United States Fidelity and Guaranty Company* could be altered by the procedural mechanism of Rule 23.

Yet, proceeding upon the assumption, which we believe is incontrovertible, that neither the Declaratory Judgment Act nor Rule 23 alters the substantive holdings of *Turner* and *United States Fidelity and Guaranty Company*, the only remaining ground for distinction is the presence of the Secretary of the Interior as a party defendant. We submit that the substantive law of immunity from suit laid down by this Court should not be allowed to be evaded by the stratagem of naming a government officer as a party defendant. See, *Mine Safety Appliances Company* v. *Forrestal*, 326 U.S. 371, 373-374.[27] Just as the government is immune from suit when the action is in essence one for the

---

[27]See also, e.g., *Means* v. *Wilson*, 522 F.2d 833, 838 (8th Cir., 1975); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324 (9th Cir., 1975), cert. den. sub. nom., *Sustenkewa* v. *Hathaway*, U.S. (March 29, 1976); *Tewa Tesuque* v. *Morton*, 498 F.2d 240, 242 (10th Cir., 1974).

recovery of money from the sovereign, because under such circumstances it is the real, substantial party in interest and is entitled to invoke its immunity even though the suit is nominally brought against government officers, see, *Ford Motor Company* v. *Department of the Treasury*, 323 U.S. 459; *Minnesota* v. *Hitchcock*, 185 U.S. 373, so, also, the tribal government should be allowed to invoke its immunity from suit when the action is in essence one to prevent the payment of money to the tribe which Congress has ordered to be paid. This immunity should not be rendered a mere matter of form by the device of naming a government officer as a defendant and seeking relief against that officer. This point is peculiarly important in regard to federally recognized Indian tribes. The Secretary of the Interior will, in virtually any case involving appropriated funds to a federally recognized tribe, be available as a nominal defendant. If, by chance, the Secretary is not, the Commissioner of Indian Affairs will be available as a nominal party. With a nominal party available—against whom a private plaintiff can request injunctive process—the immunity from suit of federally recognized Indian tribes will, in the present context, be a hollow immunity—one that is no more effective in preventing the disruption of tribal affairs in the future than it has been in the present three years-long litigation.

Appellees suggest that the decision of the Absentee Delaware Tribe of Western Oklahoma to comply with the District Court's Order of November 1, 1974, denying the Motion to Dismiss and the Motion for Partial Summary Judgment of the Defendants below, and granting appellees' request for class action proceedings should be construed as

acquiescence in the action taken below. We submit this suggestion, again, mingles substance with procedure. Once the District Court had determined to overrule both the Motion to Dismiss and the Motion for Summary Judgment, we are aware of no way, short of an appeal from a citation for contempt, by which the correctness of the court's decision could be tested, nor any way in which counsel for appellants could prevent a re-litigation of all the issues presented—in a suit against the tribe—on the ground that a decision which did not name the tribal government or the tribe could not be *res judicata*, unless some action was taken to protect the tribe in the *Frazier* litigation. Therefore, in keeping with the District Court's order of November, 1974, the Absentee Delaware class, as defined by the court, sought and obtained intervention in the *Frazier* litigation. This compliance with the court's order cannot fairly, we submit, be construed as relinquishment of an immunity which this Court held, in *United States Fidelity and Guaranty Company*, to be jurisdictional.

We suggest that the difficult decision to which the tribal government was put, i.e., to intervene—as a class defined by the court—in the *Frazier* litigation and risk having this intervention held to be detrimental, on the one hand and, on the other, to run the risk of relitigating the issues in the *Weeks* case over again in the *Frazier* case, is precisely the sort of situation which the Court sought to prevent with its decision in *United States Fidelity and Guaranty Company*, and that this principled holding should be reaffirmed in the context of the present appeal.

III.

THE DISTRICT COURT HELD THIS INDIAN CLAIMS JUDGMENT DISTRIBUTION STATUTE TO AN IMPROPER STANDARD OF REVIEW.

The District Court conceded that the "Kansas Delawares' " equal protection claims under the Fifth Amendment involved neither a "suspect classification" nor a "fundamental interest." J.S. App. p. 33; 406 F.Supp. 1309-1329. There is, thus, no question of "strict" equal protection scrutiny presented here. Despite this, the majority subjected the statute to a rigorously demanding scrutiny of "means-ends" analysis. Indeed, as the court noted, it obtained, on its own motion a legislative history of this statute through the resources of the Administrative Office of the United States Courts and the staffs of the Congressional Committees concerned. J.S. App. p. 34 n. 25; 406 F.Supp. 1309, 1329. Employing this legislative history, the majority concluded that members of the Congressional Committees on Indian Affairs who drafted the statute at issue did not "intend" to exclude the "Kansas Delawares"; that lack of precise knowledge on the part of the members of the committees who drafted this statute was "disturbing"; that Congress did not "really" mean what the statute it enacted says; and that Congress should be instructed to legislate again. It is important to note that the legislative history of the statute was *not* employed as an aide to its construction for it is clear, precise and needs no construction. Rather, the Court examined this legislative history in an attempt to determine the motives which moved Congress to enact the statute. So far as can be determined from objective evidence, the majority's conclusion as to Congress'

"intent" is dubious. As Judge Daugherty emphasized, and as the majority conceded,

> "Congress had before it another Bill which would have distributed [Indian Claims Commission Docket] 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in [Indian Claims Commission Docket] 337 [25 U.S.C. 1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware tribes in Oklahoma and those on their membership rolls.*" J.S. App. p. 89; 406 F.Supp. 1309, 1357. (emphasis added)

The majority admitted the correctness of Judge Daugherty's statement, J.S. App. p. 34-39, 71-78; 406 F.Supp. 1309, 1330-1332 and 1348-1350, but deduced Congress' motive for so drafting this statute to be exclusion of Munsee Indians, rather than the "Kansas Delawares."[28] The result appears to be as follows: Exclusion of Munsee Indians, and other Indian tribes or groups (whether or not federally recognized tribes) from the distribution provisions of 25 U.S.C. (Supp. IV) 1291-1297 is constitutional since Congress intended the exclusion; on the other hand, exclusion of the so-called "Kansas Delawares" is unconstitutional since Congress did not "really" intend to exclude them.

With the foregoing analysis of what Congress "really" intended to accomplish here, the majority below vitiated the distribution statute to the two federally recognized Delaware Tribes. The holding of first impression below,

---

[28]The Munsees are Indians ethnologically related to the Delaware Tribe.

and the extraordinary limitation on Congress' plenary power over Indian affairs which it constitutes, was thus predicated upon the majority's obvious belief that Congress did not intend the result here accomplished. Indeed, appellees, in their Motion to Dismiss Appeal, refute Judge Daugherty's statement solely upon the ground that Judge Daugherty believed "Congress *intended* to excude the Kansas Delawares." Motion p. 26 (Emphasis in Motion.). Appellees themselves rely solely upon the argument that "the 'some people' referred to [by Judge Daugherty] were not the Kansas Delawares but were Munsee Indians whose ancestors were not with the tribe at the time of the wrong . . .". *Id.*

We submit this search for some supposed purpose Congress "really" had in mind is factually useless and legally impermissible.

In *United States* v. *O'Brien*, 391 U.S. 367, this Court upheld the constitutionality of 50 U.S.C. App. 462(b), a statute forbidding a registrant under the Selective Service System from destroying his selective service registration certificate, against a challenge predicated upon the contention that Congress intended, by the statute, to inhibit the freedom of expression secured by the First Amendment. The Court rejected this argument "because under settled principles the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional." 391 U.S. at 383. Cautioning that "[i]nquiries into congressional motives or purposes are a hazardous matter . . .", the Court reminded that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional

statute on the basis of an alleged illicit legislative motive." *Id.* In the present case, the District Court did not suggest that Congress had an "illicit" purpose but, rather, that Congress' supposed lack of precise knowledge of *all* the non-federally recognized Delaware Indians who might be excluded from sharing in the distribution under the terms of 25 U.S.C. (Supp. IV) 1291-1297 was "disturbing." J.S. App. p. 39; 406 F.Supp. 1309, 1332. But, "the motives or purposes of Congress" are not a subject of "judicial inquiry in considering the power of that body to enact [a statute]." *McCray* v. *United States*, 195 U.S. 27, 37. And this Court has consistently ruled "frivolous" any attempt to invalidate an Act of Congress which "rests upon the erroneous assumption that the motive of Congress in exercising its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised." *Weber* v. *Freed*, 239 U.S. 325, 330. Yet the majority below inquired with the greatest detail into the motives which it believed moved Congress to enact the statute now at bar. The majority concluded that excluding the "Kansas Delawares" was not among Congress' purposes, on the one hand, and, on the other, that such purposes as Congress had were insufficient. We submit this entire exercise was contrary to the "fundamental principle of constitutional adjudication," *United States* v. *O'Brien*, 391 U.S. at 383, that an inquiry into legislative motive is one not open to the courts, and that the judgment below voiding an Act of Congress—in an area where Congress' power is plenary—on the basis of such an inquiry should be reversed.

IV.

CONGRESS COULD RATIONALLY DECIDE TO LIMIT DISTRIBUTION OF A CLAIMS COMMISSION JUDGMENT TO STATUTORILY DESCRIBED MEMBERS OF THE TWO FEDERALLY RECOGNIZED DELAWARE TRIBES.

25 U.S.C. (Supp. IV) 1291-1297 distributes a Delaware claims judgment to the members of the two federally recognized Delaware Tribes, as membership is defined for purposes of this statute, and to the two federally recognized Delaware Tribes, as entities, for expenditure for common tribal purposes. 25 U.S.C. (Supp. IV) 1292 and 1294. Membership in the tribes is defined by reference to two modern rolls. Membership in the Absentee Delaware Tribe is, for purposes of the statute now at bar, defined by reference to a 1940 base census roll prepared by the Bureau of Indian Affairs, supplemented by a provision allowing those Absentee Delawares whose names were eligible to be placed on the roll, but who were inadvertently omitted by the Bureau of Indian Affairs census, to demonstrate to the Secretary of the Interior that they were eligible to be on this roll. The use of this roll was, as the legislative history shows, urged upon Congress by the tribal government at the hearings of the House and Senate Indian Affairs Subcommittees. As the testimony before the subcommittees demonstrates, the primary purpose for employing this roll, rather than an ethnological standard of lineal descendancy, was the chaos which ensued when Congress allowed a 1968 Delaware claims judgment[29] to be distributed on a lineal descendancy basis. This lineal descendancy provision resulted,

---

[29]Indian Claims Commission Docket 337, distributed by 25 U.S.C. 1181-1186.

in Judge Daugherty's accurate description, in "such problems, turmoil, confusion and delay . . . that these funds have not yet been fully distributed!" J.S. App. 86; 406 F.Supp. 1309, 1355. As Judge Daugherty stated, it is "fair to conclude that this change in attitude about distribution in both the [Indian Claims] Commission and the Congress came from the problems which resulted from the earlier distribution and the realization that it was wrong." *Id.* This is sufficient to provide a rational basis for the statute, and a demonstration that the statute was not a product of caprice. Nothing in the Due Process Clause prevents Congress from learning from experience. Especially is this true where Congress is doing no more than selecting a "pattern of distribution" for the payment of an Indian Claims Commission judgment according to criteria which define the "pool of Indians who [are] to benefit from a distribution . . ." *United States* v. *Jim*, 409 U.S. 80, 82; where the benefits accrue to the tribal entities who had prosecuted the claim which formed the basis of the appropriation statute to judgment, and who had appeared before the Indian Affairs Subcommittees of the House and Senate in response to congressional requests to all those who believed themselves interested to appear and give the subcommittees their views. *Cf., Katzenbach* v. *Morgan*, 384 U.S. 641, 653; *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, *affirming*, 244 F.Supp. 808 (E.D. Wash.). Especially in grappling with the necessity of enacting a statute dealing with such complex sociological issues, the admonition of *Jefferson* v. *Hackney*, 406 U.S. 535, 546-47, that "[t]he very complexity of the problems suggest there will be more than one constitutionally permissible method of solving them . . ." is particularly appropriate. *Cf., Northern*

Cheyenne Tribe v. *Hollowbreast*, ... U.S. ..... , No. 75-145 (May 19, 1975), slip opinion, at 6-7.

Congress' determination to distribute this Delaware claims judgment to the federally recognized Delaware tribal Indians, based upon available, reasonable and objective criteria for defining such tribal Indians, was clearly within its expansive constitutional power over Indian affairs. *Morton* v. *Mancari*, 417 U.S. 535, 552-553, and n. 24; *Moe* v. *Confederated Salish and Kootenai Tribes*, ... U.S. ..... , No. 74-1656 (April 27, 1976) slip opinion at 15-16. While membership in the Absentee Delaware Tribe of Western Oklahoma, as defined in the tribal constitution, does not precisely coincide with membership in the Absentee Delaware Tribe as specified in 25 U.S.C. (Supp. IV) 1292(c) (2), (the tribal constitution contains a 1/8 blood requirement) this is a distinction without a legal difference. The persons specified in the statutory plan obviously have a close connection to the tribe, being on, or eligible to be on, its 1940 census roll, and Congress could permissibly conclude that their relationship to the tribe was sufficiently substantial to accord them membership for purposes of this statute. This Court has so held on numerous occasions. See, e.g., *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813 (E.D. Wash.) *affirmed*, 384 U.S. 209; *United States* v. *Jim*, 409 U.S. 80, 82-83. Cohen's *Federal Indian Law* succinctly summarizes the governing law:

> "Congress may by law provide for an enrollment of members [in an Indian tribe] *for a specified purpose*. In so providing, it may supersede a tribal determination in the administration of tribal property, particularly its distribution among members of the tribe. *Thus*,

> *the United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property.*"

F. Cohen, *Federal Indian Law* (Rev. Ed., 1958) p. 43 (Emphasis added). And, as Cohen observes, congressional power in this regard includes the power to administer tribal property so as to distribute it only to certain selected tribal members, or even to persons who are not considered by the tribe to be members of the tribe at all. Cohen, supra, at 44-45; see particularly, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 490; *Wallace* v. *Adams*, 204 U.S. 415, 423.

Congress attempted no such drastic action in the statute now at bar. The persons whom Congress included as members of the Absentee Delaware Tribe of Western Oklahoma clearly bear a close connection to the tribe, and the decision to include them provides no basis for the suggestion that Congress was not attempting to limit this distribution to members of the federally recognized Delaware Tribes. Congress' carefully considered and rationally based judgment in enacting this distribution statute has no stain of arbitrariness or caprice about it, and, in an area where Congress' authority is necessarily broad, should be upheld.

Appellees do not question the status of the Absentee Delaware Tribe of Western Oklahoma as a federally recognized tribe, see, *Menominee Tribe v. United States*, 391 U.S. 404, 410-411, nor the power of Congress to distinguish between federally recognized tribes and non-federally recognized non-tribal Indians. In any event, Congress' power to distinguish between the two is settled. *Morton* v. *Mancari*, supra; *Moe* v. *Confederated Salish and Kootenai Tribes*,

.... U.S. ...., No. 74-1656 (April 27, 1976), slip opinion at 15-16.[30]

Congress' authority to draw such distinctions is especially clear in the context of Indian Claims Commission Act judgments for, as the Court of Claims has held, "the Indian Claims Commission Act *requires* that awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today." *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 267-268, 315 F.2d 906, 913-914 (1971).[31] (Emphasis added). As the legislative history shows, and as the District Court acknowledged, this construction of the Indian Claims Commission Act was expressly put before Congress during the hearings on the Bill which eventually became 25 U.S.C. (Supp. IV) 1291-1297 and Congress was strongly urged to follow it. J.S. App. 36-38; 406 F.Supp. 1309, 1330-1333. Unless this construction of the Indian Claims Commission Act is itself unconstitutional—a contention which the "Kansas Delawares" do not even suggest—Congress did

---

[30]Since, as noted, the District Court conceded that no suspect classification or fundamental interest was at issue in this case, and since the statute presents no issue of any claim to procedural due process, in the sense of notice and hearing before administrative or judicial action is taken, the majority's reliance upon such cases as *Shapiro* v. *Thompson*, 394 U.S. 618, *Goldberg* v. *Kelly*, 387 U.S. 254, and *Stanley* v. *Illinois*, 405 U.S. 645, J.S. App. pp. 41, 42, 52, 406 F.Supp. 1309, 1333, 1334, 1338, is both inexplicable and misplaced. See, *Morton* v. *Mancari*, 417 U.S. 535, 552-553; *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33-34.

[31]In a related context involving an interpretation of the Indian Claims Commission Act the Court of Claims has remarked that "the biological standard" of Indian blood is virtually useless in determining Indian title for purposes of an Indian Claims Commission Act judgment. *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 436, 490 F.2d 935, 942 (1974).

not exceed its power in so doing. A carefully reasoned interpretation of the Indian Claims Commission Act by the court specially charged with its proper legal construction, is entitled to great respect. *Cf., Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ....., No. 75-145 (May 19, 1976), slip opinion at 11.

Moreover, Congress' power in regard to the award here at issue exists not only under its broad constitutional power to enact statutes affecting the Indian tribes, but, specifically, under Article VIII of the 1854 Treaty, 10 Stat. 1048, 1051, with the Delaware Tribe which provided that,

> "Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, [i.e., the Delaware trust lands] and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper."

As Judge Daugherty correctly pointed out below, this provision gave Congress "treaty authority with the Delaware Nation . . . to use its wisdom in the distribution of the funds involved herein . . ." J.S. App. p. 84; 406 F.Supp. 1309, 1354. Thus, this distribution statute finds constitutional support under both Congress' broad general power to legislate with regard to Indian tribes and precisely delineated authority stemming from Congress' treaty making power. See, *Holden* v. *Joy*, (U.S.) 17 Wall. 212, 242; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 192. *Cf., Missouri* v. *Holland*, 252 U.S. 416, 433. The statute now at bar concerns, thus, in an area where Congress has extraordinarily broad plenary power, *Northern Cheyenne Tribe* v. *Hollowbreast*,

supra; *United States* v. *Jim*, supra; *Sizemore* v. *Brady*, supra; and Congress did not exceed that power in enacting this patently rational distribution plan for the described members of the two federally recognized Delaware Tribes.

The "Kansas Delawares" seek to distinguish *Morton* v. *Mancari*, supra, and the cases which have followed it,[32] on the grounds that the Absentee Delaware Tribe of Western Oklahoma does not possess a reservation (*Kleppe* v. *Weeks*, No. 75-1495, Motion to Dismiss or Affirm p. 7-11), and that this statutory distribution is not made to federally recognized tribes. (*Absentee Delaware Tribe of Oklahoma Business Committee* v. *Weeks*, No. 75-1335, Motion to Dismiss Appeal p. 5-6). These contentions ignore the unique status of Indian tribes within the State of Oklahoma, a status this Court has long recognized. In *Morton* v. *Ruiz*, 415 U.S. 199, for example, the Court held that federal assistance (Snyder Act) benefits were properly payable to members of Indian tribes who lived near, but not on, a reservation. The Court framed the question for decision as follows:

> "Are general assistance benefits available only to those Indians living *on* reservations in the United States (*or in areas regulated by the Bureau of Indian Affairs in Alaska and Oklahoma*), and are they thus unavailable to Indians (*outside Alaska and Oklahoma*) living *off*, although near, a reservation?" 415 U.S. 199, 201 (Emphasis of words in parenthesis added.).

In discussing the history of the Snyder Act, the Court noted that the Act's benefits are available "to non-reservation

---

[32] E.g., *Fisher* v. *District Court*, ___ U.S. ___, No. 75-5366 (March 1, 1976) slip opinion at 8-9; *Moe* v. *Confederated Salish and Kootenai Tribes*, ___ U.S. ___, No. 74-1656 (April 27, 1976) slip opinion at 15-16.

Indians in Alaska and Oklahoma." The reason, as stated by the Court, quoting the Brief of the Secretary of Interior, was that "[t]he situation of Indians in Alaska and Oklahoma has historically been unique." 415 U.S. 199, 212. In reaching its conclusion the Court noted that "the Subcommittee [on Indian Affairs] was advised that Alaska *and Oklahoma Indians* are subsumed in the 'on or near' category . . . and, admittedly, they are entitled to general assistance." 415 U.S. 199, 219 (emphasis added). Indeed, the "Kansas Delawares" themselves emphasize that "[t]here are no Indian reservations in Oklahoma where most of the Cherokee and Absentee Delawares reside; . . .". (*Kleppe* v. *Weeks*, No. 75-1495; Motion to Dismiss or Affirm p. 11.) See generally, F. Cohen, *Federal Indian Law* (Rev. Ed., 1958) p. 985-986 which observes that at least twenty-seven tribes, other than the Five Civilized Tribes, reside in Oklahoma; that these include the Delaware Tribes; and that "the laws governing the Indians of Oklahoma and the applicable decisions are so voluminous that analysis of them would require a treatise in itself." This Court has often recognized the singular status of Oklahoma Indian tribes and the fact that they are under the guardianship of Congress until Congress itself determines to terminate "the guardianship relation." *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 718. The "Kansas Delawares" also contend (Motion to Dismiss Appeal p. 6) that the funds here at issue are individual, not tribal. This is simply not borne out by the distribution statute or by the Indian Claims Commission Act. The close connection between the persons specified in 25 U.S.C. 1292(c)(2) as tribal members and those whom the tribal constitution designates as members, as well as

Congress' power to define those persons who are to be treated as tribal members for purposes of a particular statute, e.g., *Sizemore* v. *Brady*, supra; *Simmons* v. *Eagle Seelatsee*, supra; *United States* v. *Jim*, supra, has already been discussed.

Additionally, the express terms of 25 U.S.C. 1294 demonstrate that Congress treated these funds as tribal in nature. 25 U.S.C. 1294(a) provides that "the Secretary to the Interior shall apportion to *the Absentee Delaware Tribe of Western Oklahoma, as presently constituted*, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to §1292(c)(2) bears to the total number of persons enrolled pursuant to §1292 of this title." (emphasis added.). Finally, since the award here is to recompense the tribe for a wrong done to the tribe, as allowed by the Claims Commission Act, the funds here are clearly tribal, not individual in nature. *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 270-272, 315 F.2d 906, 913-914; *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct.Cl. 426, 458, 490 F.2d 935, 954. Thus, the suggested distinctions between the present case and *Morton* v. *Mancari*, supra, as well as related decisions of this Court, dissolve upon analysis. The funds here at issue are tribal; the distribution is to the two modern federally recognized Delaware Tribes; and Congress was well within its constitutional power in distinguishing between the persons and entities described in the distribution statute and other non-federally recognized, non-tribal descendants of expatriated members of the ancient tribe. *Morton* v. *Mancari*, supra. It is noteworthy that a contrary determination

would have been extraordinary in light of the established rule that

> ". . . in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended."

Halbert v. *United States*, 283 U.S. 753, 762-763. Certainly nothing in the Constitution *required* Congress to enact a distribution statute running flatly contrary to this rule. The "Kansas Delawares' " argument that the Constitution does require such a result is without support in principle or authority. It should be rejected, and this Act of Congress should be upheld as a valid and, indeed, quite well-reasoned statutory plan. *Cf., Simmons* v. *Eagle Seelatsee*, supra, 255 F.Supp. 808, 813-814 (E.D. Wash.), *affirmed*, 384 U.S. 209.

It should not go unremarked that the District Court erred in its construction of the Treaty between the United States and the Delaware Tribe of July 1, 1866. 14 Stat. 793.[33] By its terms Article IX of the Treaty, 14 Stat. 793, 796, provided that the ancestors of the "Kansas Delawares" who resigned from the tribe, took valuable benefits not available at that time to tribal Indians, see, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106, and forever expatriated themselves from the tribe were to forfeit any right to participate in tribal properties in the future. On its face, therefore, the treaty provision precludes the claim the "Kansas Delawares" are asserting

---

[33] We have previously discussed the reasons why the District Court erred, we believe, in making any construction of the treaty a basis for its holding.

here The rationale of the majority below for disregarding this provision of the treaty was the rule that treaties between the United States and the Indian tribes are to be construed so as to resolve all doubts in favor of the Indians involved. J.S. App. p. 49; 406 F.Supp. 1309, 1337. This indisputably sound rule has no application here. Already this Term the Court has said that "the canon that 'statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor' . . . has no application [where] . . . the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members." *Northern Cheyenne Tribe* v. *Hollowbreast*, ___ U.S. ___, No. 75-145 (May 19, 1976) n. 7. *A fortiori*, this canon has no application where the contesting parties are an Indian tribe and individual Indians who are not even members of the tribe, but, rather, are descendants of expatriates.

The "Kansas Delawares' argue that they also consist of individuals who are descendants of minor children of the expatriated Delawares. But the minor children of those Delawares who elected to resign from the tribe were also dealt with by Article IX of the 1866 Treaty. Article IX provides that:

> "[a]ll of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which he shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore

> provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family."

The minors were formally granted United States citizenship in 1874 and, at the same time, were issued government patents to land in fee simple, as provided in the terms of the 1866 Treaty. 18 Stat. 146, 175. Neither the adults nor the minors were considered members of the tribe by 1904 when a Delaware claims judgment was distributed and this precise question was carefully considered. See, 25 Op. A.G. 308 (1904) and, 11 Dec. Comp. Gen. 496. The combination of the 1866 Treaty and the 1874 statute clearly terminated the minors as members of the Delaware Tribe. See, *Wilbur* v. *United States, ex rel Kadrie*, 281 U.S. 206, 217; see generally, F. Cohen, *Federal Indian Law*, supra, pp. 43-47 and cases cited therein.

It is, therefore, clear that the "Kansas Delawares," whether descendants of expatriated adults or their minor children have, pursuant to the terms of Article IX of the 1866 Treaty, been without right to claim the fruit of a Delaware tribal judgment. That, indeed, was, perhaps, the primary purpose of Article IX of the Treaty. No canon of statutory construction prevents these words from being read according to their natural sense. So read, they clearly bar descendants of the expatriated Delawares from sharing in this tribal judgment. *Halbert* v. *United States*, supra, 283 U.S. 753, 762-763.

At the very least, Congress could rationally so conclude in enacting this distribution statute to the two modern Delaware Tribes, and, an abundance of rationality justify-

ing the statute being clearly present, the statute's carefully-drawn provisions should be sustained. The contrary decision of the divided court below is plainly in error and should be reversed for the reasons, and upon the decisions of this Court above set forth.

V.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE "KANSAS DELAWARES" HAVE NO VESTED INTEREST COMPENSABLE UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT TO THE FUNDS DISTRIBUTED BY 25 U.S.C. (SUPP. IV) 1291-1297; IN ANY EVENT, AN INDEPENDENT JUDGMENT COULD ONLY BE ENTERED BY THE COURT OF CLAIMS IN A DIRECT PROCEEDING AGAINST THE UNITED STATES.

The District Court unanimously held that the "Kansas Delawares" had no vested right in the funds appropriated by 25 U.S.C. (Supp. IV) 1291-1297 which would be compensable under the Just Compensation Clause of the Fifth Amendment. We submit this decision was clearly correct. The funds at issue are, as shown above, tribal property which does not vest in an individual until final absolute distribution. In *United States* v. *Jim*, 409 U.S. 80, for example, the Court held that a 1968 statute enlarging the "pool of beneficiaries" of Navajo Indians in mineral rights on the Navajo reservation did not give rise to a Just Compensation Clause claim by those Navajos who held under a 1933 statute and who found their portion of mineral royalties diminished by the 1968 statute. Holding the 1968 statute constitutional, the Court stated:

> "It is settled that '[w]hatever title the Indians have is in the tribe, and not in the individuals . . .' *Cherokee*

Nation v. *Hitchcock*, 187 U.S. 294, 307; *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127, 136 . . .

> "Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the . . . royalties. . . . This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon the residents of the [Navajo Reservation] by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation." *United States* v. *Jim*, 409 U.S. 80, 82-83.

More recently, in *Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ....., supra, No. 75-145 (May 19, 1976) the Court held that no violation of the Just Compensation Clause was occasioned when Congress amended an allotment act which provided that after fifty years mineral deposits underlying allotted land would become the property of the respective allottees, to provide instead that the mineral rights would be reserved in perpetuity for the benefit of the tribe. Reversing a contrary decision below, the Court stated:

> "The Court of Appeals erred in its basic approach to construction of the 1926 [allotment] Act. Its view was that Congress must be regarded as having relinquished its control over Indian lands in the absence of an express statement of its intent to retain the power. Just the opposite is true. The Court has consistently recognized the wide-ranging congressional power to alter allotment plans until those plans are executed. [Citations] . . . The extensiveness of this congressional authority, as well as 'Congress' unique obligation toward the Indians,' *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974), underlies the judicially fashioned canon of construction that these statutes are to be read to reserve Congress' powers in the absence of a clear

> expression by Congress to the contrary." *Northern Cheyenne Tribe* v. *Hollowbreast*, supra, slip opinion at 6-7 (footnotes and citations omitted).

In light of these and many other holdings of this Court, the District Court was obviously correct in holding appellees' claims under the Just Compensation Clause insubstantial.

There should be no need to reach the question whether appellees have an *independent* right to maintain an action for compensation in the Court of Claims. The independent right to compensation of a private party provides no justification for enjoining the operation of a statute, so long as Congress has not clearly foreclosed resort to the remedy of an action in the Court of Claims. *Hurley* v. *Kincaid*, 285 U.S. 95; *Regional Rail Reorganization Act Cases*, 419 U.S. 102. In the present case, there is no indicta whatever of any intent on the part of Congress to foreclose any private party from asserting whatever claims he believes himself entitled to in the Court of Claims. It follows, therefore, that any such independent action, based upon the Just Compensation Clause of the Fifth Amendment, would provide no basis for enjoining 25 U.S.C. (Supp. IV) 1291-1297 and that the question is simply not at issue in the present case. *Hurley* v. *Kincaid*, supra.

CONCLUSION

For the reasons set forth above, it is earnestly submitted that the decision of the divided court below should be reversed with instruction to vacate and dismiss its judgment.

Respectfully submitted,

BERNARD J. ROTHBAUM, JR.

Counsel for the Absentee Delaware Tribal Business Committee, et al.

of Counsel:

TOMERLIN, HIGH, PATTON & ROTHBAUM
323 Fidelity Plaza
Oklahoma City, Oklahoma 73102

August, 1976

CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on the ..... day of August, 1976, serve three true and correct copies of the above and foregoing Brief on the Merits upon: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellee, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Appellees, Dorothy Frazier and Ruth Rattler; Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D.C. 20006, counsel of record for Appellee, Wanda June Weeks; and Mr. Joseph Fontana, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Appellants, Cherokee Delaware Class and named individual members thereof; by placing three copies of the same in the United States mail, postage fully prepaid; I further certify that I did on the 16th day of March, 1976, in conformity with Rule 33, 2(a) of the Rules of the Supreme Court, serve three true and correct copies of the above and foregoing Brief on the Merits upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, postage fully prepaid; I further certify that all parties required to be served have been served; and that service has been made in conformity with Rule 33 of the Rules of the Supreme Court.

Bernard J. Rothbaum, Jr.